No. 2643.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COMPANY, a corporation,

Defendant in Error.

ANSWER TO PETITION FOR REHEARING

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Filed this.....day of December, 1916.

FRANK D. MONCKTON, *Clerk.*

By.....

Deputy Clerk.

TABLE OF CASES REFERRED TO

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NOTE:—For table of cases referred to see preceding page.

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In its petition for a rehearing plaintiff in error merely elaborates some of the arguments made in its briefs.

In the petition for rehearing there are three contentions made. The first is that the opinions of the Commission construing the Constitution and its own orders are binding upon the courts. The second contention is that the Commission is the "court of last resort" of California, and that its decisions on matters of law are binding on the Federal Courts. The

third contention is that the courts should adopt the construction said to have been placed by the Commission upon the Constitution as it existed prior to October 10, 1911. In support of this contention authorities are cited to the effect that where a statutory provision is ambiguous, and a body charged with the administration of the statute has construed such ambiguous provision, and such construction has been acquiesced by all departments of the government for a long period of time such construction should be adopted by the courts.

We will reply to their contentions under the following heads:

1. Reply to contention that the opinions of the Commission construing the Constitution and construing its own orders are binding on the courts.

2. Reply to contention that the Commission is the "court of last resort" of California and that its opinions are binding upon the Federal Courts.

3. Reply to contention that the courts should adopt the construction said to have been placed by the Commission upon the Constitution as it existed prior to October 10, 1911, in support of which contention plaintiff in error cites authorities holding that where a statutory provision is ambiguous, and the body charged with its administration has construed such ambiguous provision, and its construction has been acquiesced in for a long period of time, such construction should be adopted by the courts.

1. REPLY TO CONTENTION THAT THE OPINIONS OF THE COMMISSION CONSTRUING THE CONSTITUTION AND ITS OWN ORDERS ARE BINDING ON THE COURTS.

This contention is based upon the decision of the Supreme Court in *Pacific Tel & Tel. Co.* v. *Eshleman,* 166 Cal. 644, 650. Because, as held by the Supreme Court in the case, the findings of fact of the Commission are final and not subject to review, it is contended that the opinions of the Commission on questions of law are equally binding.

As pointed out at page 82 of Defendant in Error's brief on the re-argument all that the Supreme Court held in *Pacific Tel., etc., Co.* v. *Eshleman, supra,* was that "the powers and functions of the Railroad Commission in many instances, and in the present one, are of a highly judicial nature." The power under consideration by the Supreme Court related to compelling physical connection between the lines of competing telephone companies. The question as to whether or not the powers exercised by the Commission were judicial was necessarily before the Court because the application in the *Telephone* case was for a writ of *certiorari*, which will be issued only to a body exercising judicial functions. In holding that the powers were of a judicial nature and that the writ should issue, the Supreme Court cited as authority the case of *Imperial Water Co.* v. *Board of Supervisors,* 162 Cal. 114, wherein the court had held that a board of supervisors in taking the steps required by statute for the organization of an irrigation district exercises judicial functions.

In its petition for a rehearing the plaintiff in error does not attempt to question the correctness of the views of this court in relation to the *Telephone* case.

In the petition for a rehearing the statement is made that "The Railroad Commission of the State of California has been constituted a 'court of last resort,' and its decisions in cases such as this are final and not reviewable."

Now the matter here involved is very simple. When the Constitution was amended on October 10, 1911, the Commission was empowered to hear applications of the carriers for relief from the long and short haul prohibition, and, if after investigation, it reached the conclusion that relief should be granted, the Commission was authorized to prescribe the extent to which the carrier might be relieved from the prohibition. The constitutional provision reads as follows:

> "It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission, provided for in this Constitution, such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent

to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

If after investigation the Commission had made an order granting relief its order would not be reviewable in the courts. But the Commission has made no order granting relief, and no order of the Commission granting relief is under "review" in this case. The shippers represented by the defendant in error are insisting that the carrier refund charges collected in violation of the Constitution. The plaintiff in error, in its answer, pleaded that the Commission, after investigation, had granted permission to charge the rates which the plaintiff in error collected. This defense wholly failed, for no such order of the Commission was proved.

The contention of plaintiff in error amounts merely to this: That the *opinion* of the Railroad Commission as to the effect of its orders made subsequent to October 10, 1911, is binding on the courts. Counsel say that the Railroad Commission of California is the "court of last resort" where questions of the construction of the constitutional provisions relating to public utilities are involved or where the orders of the Commission itself are involved.

This contention was made at the last oral argument and was replied to at page 81 of defendant in error's brief on re-argument.

As stated in our brief, the Supreme Court of California and the District Courts of Appeal are ordained by the Constitution for the purpose of authoritatively

construing the laws of California. The power to construe the laws was not vested in the Railroad Commission. *Necessarily any body exercising judicial functions is required to construe the law for the purpose of the inquiry then being conducted; but its construction of the law is not authoritative.* The power of the Railroad Commission is not different in this respect than the power of a board of supervisors when it takes the various steps required by statute for the purpose of organizing an irrigation district.

The decision of the Supreme Court in the *Telephone* case (166 Cal. 640, 650), *supra,* to the effect that in compelling physical connection between the lines of competing telephone companies the functions of the Railroad Commission were of a judicial nature was based upon the authority of the case of *Imperial Water Company* v. *Board of Supervisors, supra,* where it was held that in taking the steps to organize an irrigation district a board of supervisors exercises judicial functions.

Although the opinion in the *Telephone* case is lengthy, the matters decided were few and simple. Before the Court could consider the application for writ of *certiorari,* it was called upon to say that in compelling physical connection between the lines of two telephone companies the Railroad Commission exercised judicial functions. This was necessary because the writ will only issue to a body exercising such functions. Further the court held that the compelling of one telephone company to furnish the use of its lines to a competing company constituted a taking of private property for a public use, and this could not be done without compensating the company whose

property was taken. As the order sought to be reviewed did not make any provision for compensation the Supreme Court held that it violated the Fourteenth Amendment to the Federal Constitution and that it also violated the Fifth Amendment, which provides that private property shall not be taken for public use without just compensation. The Supreme Court also held that there was nothing in the Public Utilities Act under the authority of which the Commission proceeded which evidenced an intention that the compensation should not be made *before* the property was taken, as required by Section 14 of Article I of the Constitution of California. Because it violated these provisions of the Federal and State constitutions the order was annulled. With reference to the violation of the State Constitution the Supreme Court held that the legislature, in legislating on the subject of public utilities, had the power to ignore all provisions of the State Constitution except the provisions thereof relating to public utilities.

The contention of plaintiff in error is that where a body is vested with judicial powers and the law provides that a determination of a question of fact by such a body is final and not subject to review, that the body becomes thereby a "court of last resort" in construing the statute vesting it with such powers; and in determining the legal effect of the orders which it may make in the exercise of such powers.

Of all the contentions made by plaintiff in error in this case, this is, we respectfully submit, the most unsubstantial. And yet it is made the foundation for a petition for a rehearing, presumably for the reason that the Court did not specifically refer to it in its

opinion rendered herein. We presume the fact to be that this contention, as well as some other contentions of plaintiff in error, were so patently groundless that this court did not deem it necessary to answer them.

All that the Supreme Court held in the *Telephone* case, or in any other case, is that the findings of the Commission on questions of fact are not subject to review, provided the findings are within the jurisdiction of the Commission. Counsel for plaintiff in error should realize this, for at the same time they make the contention that the Commission is a "court of last resort," they quote and italicize (Petition for Rehearing, page 9), the following language from the decision of the Supreme Court in *Oro Electric Corporation* v. *R. R. Commission,* 169 Cal. 466, 471:

> "The findings and conclusion of the Commission on questions of fact are made final and not subject to review."

With reference to the causes of action which accrued subsequent to October 10, 1911, counsel state:

> "The Commission has definitely and finally decided:
>
> (c) That the Railroad Commission of the State of California has authorized the carriers to deviate from the long and short haul clause."

The petition for a rehearing then goes on to mention the order of October 26, 1911, the order of November 20, 1911, the "hearing" of January 2, 1912, and the order of January 16, 1912.

Referring to the contention that the Commission

had authorized the charges made by plaintiff in error, this Court in its opinion herein said:

> "The orders of November 20, 1911, and January 16, 1912, made by the Commission went no further than to give permission to railroads to file with the Commission for establishment such changes in rates and fares as would occur in the ordinary course of their business, 'continuing under the present rate bases or adjustments higher rates or fares at intermediate points, provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911,' etc., but expressly declaring 'that the commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission, or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912.' But it does not appear that the defendant filed such an application until December 30, 1911, or that an investigation was ever had by the Commission, or that it ever made an order finally approving any of said rates or fares. If, indeed, the orders of the Commission may be construed as expressly giving by their terms authority to continue in effect until an investigation, the rates then in existence which deviated from the Constitutional provision as to the long and short haul, it is obvious that the Commission erroneously assumed that the act of 1911 gave it the power to make such an order. The amendment of 1911 gives the power to authorize a deviation from the prohibition of the Constitution only upon the application of the carrier, and after an investigation by the Commission, for it does not, as does the Act of Congress giving authority to the Interstate Commerce Commission, authorize the fixing of temporary rates pending investigation. Assuming that under

> such a temporary order the defendant continued to make charges forbidden by the Constitution, it would be necessary for it to show, in defending an action for the recovery of such charges, that the Commission finally approved the rates, and made them valid by an order made after an application and investigation as required by the statute."

The contention that the Commission "has authorized the carriers to deviate from the long and short haul clause" is not based upon the orders which were admitted in evidence, *but upon what counsel state the Commission has said with reference to those orders in other cases pending before that body.* Counsel state, "The Commission has definitely and finally construed these orders and determined the scope and effect of proceedings thereunder."

This brings us back to the contention made in the briefs of plaintiff in error and again in this petition for a rehearing that the Commission is a "court of last resort" in construing the Constitution and its own orders.

As we have seen, the findings of the Commission on questions of fact are not subject to review in the courts. That is as far as the Commission is constituted a "court of last resort." But the Commission is not constituted the "court of last resort" in the matter of the construction of the Constitution of the State or in the matter of determining the legal effect of its own orders. The Supreme Court of the State and the District Courts of Appeal are the tribunals upon whom the Constitution has conferred power to authoritatively construe the laws of the State.

But as pointed out in the briefs of defendant in

error the Commission has never in any of its opinions said that it granted the applications of the carriers for relief from the prohibition of the Constitution.

In *Scott, Magner & Miller* v. *Western Pacific Railway Company,* 2 C. R. C. 626, 635, cited by plaintiff in error, the Commission said:

> "Acting under the authority granted by Section 21 of Article XII of the Constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No. 214, authorizing the carriers of the State to continue their deviations from the long and short haul clause *until the Commission could determine definitely the instance, if any, in which it will permit deviations to continue to be made.* While the Commission's order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provisions of the Constitution."

The order of February 15, 1912, referred to by the Commission, was not introduced in evidence at the trial of this case. Presumably it was to the same effect as the order of January 16, 1912, as the Commission says it "authorized the carriers of the State to continue their deviations from the long and short haul clause *until the Commission could determine definitely the instances, if any, in which it will permit deviations to continue to be made.*" The expression of opinion of the Commission to the effect that while the order "authorizing the temporary continuance of the deviations remained in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution" is merely the statement of an erroneous conclusion of law.

The next case cited in the petition for rehearing is *Phoenix Milling Co.* v. *Southern Pacific Co.* v. *Southern Pacific Company,* 7 C. R. C. 677, 682. In that case, as appears from the quotation from the opinion in the petition for a rehearing, the Commission said:

> "By this order (the order of October 26, 1911), the carriers were impliedly granted permission, for practical reasons, to maintain the *status quo* until the Commission passed upon such applications. By a subsequent order issued on November 20, 1912, in the same proceeding, express permission so to do was given."

There is no statement in this opinion to the effect that the Commission supposed it had granted relief after investigation, but merely a statement that the Commission "granted permission to the carriers for practical reasons to maintain the status quo *until the Commission passed* upon such application." But the Commission had no power to "maintain the status quo" pending investigation. The rates could be legalized only after investigation.

So in the next case cited, viz., *Fresno Traffic Assn.* v. *Southern Pacific Co.,* 8 C. R. C. 390, the Commission with reference to an order of February 15, 1912 (which order was not introduced in evidence by the plaintiff in error), said:

> "On February 15, 1912, the Commission issued an order authorizing the carriers to continue deviations from the long and short haul clause, *until the petitions had been finally passed upon by the Commission.*"

In the last mentioned case the Commission said that "previous to the order of February 15, 1912, an extended investigation was made by the Rate De-

partment of the Commission * * * with reference to the deviations from the long and short haul clause."

Counsel refer to this statement made by the Commission long after the judgment in the case at bar was rendered and in a reparation case between private parties as "the significant and conclusive finding" that an investigation was made.

It was incumbent upon the plaintiff in error to sustain its special defense that the Commission investigated its applications and granted relief. *No evidence was offered tending to show that there was any investigation, nor was any order granting authority to charge more for the shorter distance offered in evidence.*

Instead of relying upon the evidence in the record, the plaintiff in error cites an opinion of the Commission rendered a year and a half after the judgment herein was rendered, which opinion states that some sort of an investigation was made by the Commission before an order dated February 15, 1912 (not offered in evidence by plaintiff in error) was made by the Commission. Furthermore, the opinion of the Commission shows that the order of February 15, 1912, was made by the Commission on the erroneous assumption that it had power to maintain the so-called *status quo* of the rates pending investigation. According to the Commission's opinion the order of February 15, 1912, did not purport to grant, in whole or in part, any of the applications of the carriers, but was merely a blanket order attempting to legalize all rates violative of the constitutional prohibition until the Commission had passed upon the applications of the carriers.

Counsel for plaintiff in error also cite an opinion of the Commission rendered on June 19, 1916, in *Matter of the Application of Southern Pacific Company, etc., for relief* (Case No. 214), in which opinion it is stated that the order of February 15, 1912, was preceded by a "number of hearings." Referring to the order of February 15, 1912, the Commission says that it "authorized the carriers to continue in effect rates in violation of the Constitution until such time as the Commission reached a final conclusion in each individual case."

Parenthetically it may be noted that the Commission is evidently in error when it says that a number of hearings were held prior to February 15, 1912. The record in this case shows that only one hearing, that of January 2, 1912, was held. No evidence of any kind was introduced at this hearing, and it adjourned without day. A certified copy of the minutes of the meeting held in Case No. 214 on January 2, 1912, was introduced in evidence (Record pg. 423), with reference to this hearing counsel for plaintiff in error made the following admission:

> "There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day." (Record, pg. 423.)

After referring to the opinion of the Commission rendered on the 19th of last June, counsel refer to the order made in pursuance of that opinion granting certain of the applications of the Southern Pacific Company for relief from the prohibition of the Constitution. This order may be a valid defense in an action to recover for overcharges on shipments moving subsequent to June 19, 1916, but we are not con-

cerned with it in this case. It is instructive, however, as showing just which kind of an order the Commission makes when it *grants* an application for relief.

The order reads:

> "It is Hereby Ordered that the Southern Pacific Company and its connections be and they are hereby authorized to continue commodity notes as set forth in the applications and exhibits referred to in said opinion and maintain higher rates at intermediate points."

Probably many of the applications of the plaintiff in error were granted by orders of the Commission made subsequent to January 16, 1912 (the date of the order offered in evidence in this case), and prior even to June 19, 1916, but these orders could have no bearing on this case.

In concluding its argument that after October 10, 1911, the Commission granted the plaintiff in error permission to make the charges complained of in this action, plaintiff in error, at page 17 of its Petition for Rehearing, states:

> "The trial court overruled plaintiff's demurrer to defendant's special defense Number Seven, pleaded in the answer, and recognized that if the allegations were supported by eveidence that the defendant was entitled to judgment. The record disclosed conclusively that the Commission, after investigation, and after petitions had been filed by defendant, authorized defendant to charge more for the shorter distance to the intermediate points between San Francisco and Los Angeles than for the longer distance in the same direction, and as this evidence was not controverted, defendant was entitled to a judgment."

In reply to the foregoing we can do no better than to refer the Court to the part of its opinion last quoted, *supra.* No attempt is made in the Petition for Rehearing to show that the statement of the law there made is in any respect erroneous.

We cannot believe that counsel for plaintiff in error were or are in earnest in contending that the opinions of the Commission are in any sense binding on the courts. At page 18 of the Petition for Rehearing the following statement is made:

> "The Commission has repeatedly and consistently held in the decisions to which we have referred that applications sufficient in form and substance were filed, and that, after investigation, it authorized the deviation from the long and short haul provisions of the Constitution, and that being a finding of fact, is not open to review in this action."

Whether or not the Commission "authorized the deviations" is to be determined by the courts from the orders the Commission made in the premises, and not by the opinion of the Commission as to the legal effect of its orders. *A "decision" of the Commission as to the legal effect of one of its prior orders is not a "finding of fact" which is made final by section* 67 *of the Public Utilities Act, which provides that "The findings and conclusions of the Commission on questions of fact shall be final and not subject to review."*

With reference to the causes of action which accrued prior to October 10, 1911, the date the Constitution was amended, plaintiff in error states:

> "The Railroad Commission of the State of

> California has rendered decisions which are final and from which no appeal can be prosecuted, deciding that there can be no recovery under the provisions of Section 21 of Article XII of the Constitution of 1879, on shipments moving under rates which had been 'established and published' by the Commission under the provisions of Section 22 of the same article and the record in the case at bar shows that the Commission has approved the tariffs relating to the traffic involved in this controversy."

In its opinion herein this Court said:

> "As to the first group of claims, that is, those on charges collected prior to October 10, 1911, it was claimed by the plaintiff, and held by the Court below, that the Commission was powerless to charge rates in contravention of the prohibition of the Constitution, and that if the Commission assumed to fix such rates, the act was void, and cast no obligation upon the carrier to obey its order, and afforded no protection for its act."

This Court held that the District Court committed no error.

No attempt is made in the petition for rehearing to show that the holding of the District Court is erroneous or that the decision of this Court is erroneous. But it is contended that in construing the Constitution this Court was bound to adopt the construction which counsel say the Commission has placed upon it in its opinion rendered in the case of *Scott, Magner & Miller* v. *Western Pacific Ry. Co.*, 2 C. R. C. 626. Counsel say: "These decisions of the Commission, as we have heretofore shown, are final and not subject to review; they are the decisions of a 'court of last resort' construing the State law.

In the first place the expression of opinion in *Scott, Magner & Miller* v. *Western Pacific Railway,* 2 C. R. C. 626 (decided April 15, 1913), to the effect that the Commission had power to establish rates which violated the long and short haul prohibition of the Constitution as it existed prior to its amendment on October 10, 1911, was merely a *dictum.* It was held that the rates complained of by the complainant in that case did not violate the terms of the long and short haul clause of the Constitution, as it existed, prior to the amendment, and it was further held that the rates complained of had never been "established" by the Commission. This matter is fully discussed at pages 133 to 138 of the first brief filed by defendant in error.

In the case of *Scott, Magner & Miller* v. *S. P. Co.,* 3 C. R. C. 339 (decided August 2, 1913), the statement of the Commission that prior to October 10, 1911, it could lawfully establish rates which violated the long and short haul prohibition of the Constitution was also a *dictum.* The matter was not involved in that case, as the Commission conceded that the rates charged did not violate the terms of the Constitutional prohibition. Like the shipments involved in the first *Scott, Magner & Miler* case, the shipments in the second case moved from points west of Tracy to San Francisco and Oakland. The lower charge upon which the complainant based its claim to reparation was the charge from Tracy to San Francisco and Oakland. In holding that the long and short clause of the Constitution was not violated, the Commission, after quoting the Constitutional provision, said:

> "It will be noted that this provision includes only such cases as involve a lower rate *'to a more distant station, port or landing.'* It is not suffi-

> cient that the case involves a lower rate *'from a more distant station, port or landing.'* Complainants rely in this proceeding on the fact that the rate from points intermediate between Tracy and San Francisco is less than the rate from Tracy to San Francisco, i. e., less than the rate *'from a more distant station, port or landing.'"*

The Commission further said:

> *"If the rates collected by the defendant company upon the shipments involved in this proceeding moving between June* 2, 1911, *and October* 10, 1911, *are in violation of any of the provisions of the Constitution or statutes of this State, the complainants are entitled to reparation."*

In the case of *Penoyar* v. *S. P. Co.,* 3 C. R. C. 576 (decided Sept. 19, 1913) the Commission merely held that a shipper who, prior to October 10, 1911, paid the rates established by the Commission was not entitled to show that such rates were discriminatory. The case did not involve the long and short haul clause of the Constitution.

Counsel refer to the order made by the Commission on March 28, 1912, which was offered in evidence at the trial (Tr. pg. 428). This order is referred to under the title "Causes of Action arising prior to October 10, 1911." In this order the Commission prescribed the actual rates to be charged to the various points.

This order was objected to upon the ground that it was not effective until all the shipments described in the complaint had moved (Tr. pg. 427). When this objection was made counsel for plaintiff in error said:

"Inasmuch as counsel objects upon the ground that it did not become finally effective until May 27, 1912, and the objection is well taken and that is correct, I will stipulate to that, for the purpose of saving putting in or offering the extension order." (Tr. pg. 427.)

2. REPLY TO CONTENTION THAT THE COMMISSION IS THE "COURT OF LAST RESORT" OF CALIFORNIA AND THAT ITS OPINIONS ARE BINDING UPON THE FEDERAL COURTS.

Much of what is said under the preceding head is also in answer to this contention.

In the last subdivision of the petition for a rehearing the contention is made that the decisions of the Railroad Commission are the decisions of a "court of last resort" and are "binding upon the Federal Courts."

Counsel say that in the *Telephone* case the Supreme Court held that the Commission was a "court." All that the Supreme Court held in that case was that the Commission was a body exercising judicial functions. In one part of its opinion the Court said that in the Railroad Commission the Constitution had created "both a court and an administrative tribunal." This statement has the same meaning as the statement that the Constitution created an administrative tribunal and a tribunal empowered to exercise certain judicial functions. That the Commission is not a court in the ordinary meaning of the term was plainly recognized by the Supreme Court. At page 657 the court refers to the clearly expressed attempt of the Legislature in the Public Utilities Act "to deprive all the courts of the State of the power to say whether a specific order of the Commission is reasonable or discriminatory." At page 687 the Court said:

> "In the case of public utilities the power of eminent domain shall be exercised and damages assessed by the railroad commission, while the owners of all other kinds of property shall have the assessment made in court by a jury."

But, as we have seen, all that the Supreme Court held in the *Telephone* case is that under Section 67 of the Public Utilities Act the findings of fact made by the Commission are not subject to review in the courts.

In support of this contention counsel cite the case of *Missouri, Kansas & Pacific Ry. Co.* v. *Elliott,* 184 U. S. 530. In that case the Supreme Court merely held that where the decision of a court of the state is made final by statute, a writ of error will lie direct to the Supreme Court of the United States from the court in which the decision is final. This has been held time and time again by the Supreme Court. Many of the decisions of that court were rendered on writs of error to county courts whose decisions on appeal from courts of justices of the peace were made final by statute. But the Supreme Court in such a case is not bound by the construction of the state law adopted by the county court. For the proper construction of that law the Supreme Court looks to the decisions of the court of last resort of the state.

The rule that in construing state statutes the Federal Courts will follow the decisions of the court of last resort of a state is stated in the following terms in the case of *Northern Pacific Ry. Co.* v. *Meese,* 239 U. S. 614, 619:

> "It is settled doctrine that Federal Courts must accept the construction of a State statute *deliberately adopted by its highest court.*"

This has been the rule adopted by the Supreme Court from the earliest times. In *Nesmith* v. *Sheldon,* 7 How. 812, the Supreme Court said:

> "It is the established doctrine that this Court will adopt and follow the decisions of the State Courts in the construction of their own Constitution and statutes, *when that construction has been settled by the decisions of its highest tribunal.*"

In *Ankeny* v. *Hannon,* 147 U. S. 118, 126, cited by plaintiff in error, the Supreme Court said:

> "That case, it is true, was decided by the Supreme Court Commission of Ohio and not by the Supreme Court of the State, but that Commission was appointed by the Governor of the State, under an amendment of the Constitution adopted to dispose of such part of the business on the docket of the Supreme Court as should by arrangement between the Commission and the Court be transferred to the Commission. *The amendment declares that the Commission shall have like power and jurisdiction in respect to such business as may be vested in the court.* A decision of the Commission upon a question properly presented to it in a judicial proceeding is, therefore, entitled to the like consideration and weight as a decision upon the same question by the court itself, and is equally authoritative."

In quoting from this case, plaintiff in error quoted only the last sentence of the foregoing excerpt.

Counsel say that the case of *L. & N. R. Co.* v. *Kentucky,* 183 U. S. 503, 507-8, is "directly in point" in support of the contention that the opinion of the Commission construing the constitution is the decision of the "court of last resort" of the State, and is binding upon the Federal Courts. *In the case cited the Supreme Court of the United States, in construing the constitution of Kentucky, followed the decision of the Court of Appeals of Kentucky.*

In contending that the opinion of the Commission is the decision of a "court of last resort" and binding as such upon the Federal Courts, counsel at page 44 of the petition for rehearing state:

> "There are now pending in the State Courts many suits involving claims of a character similar to that involved in the case at bar, in which suits the State Courts are bound under the decisions of the Supreme Court of the State of California to regard the decisions of the Railroad Commission of the State as final and controlling."

As a matter of fact in one of the actions referred to, viz., *California Adjustment Company* v. *A. T. & S. F. Ry. Co.,* the Superior Court of Kings County rendered judgment in favor of the plaintiff, representing the shippers. The defendant appealed to the Supreme Court, and its appeal is now pending. The appellant has filed its brief on this appeal. One of the gentlemen who appeared as counsel in the case at bar is the writer of the appellant's brief in the case pending in the Supreme Court. In his brief there is no contention or suggestion that the Supreme Court in construing the Constitution is bound by the *dicta* of the Commission in the two *Scott, Magner & Miller* cases.

3. REPLY TO CONTENTION THAT THE COURTS SHOULD ADOPT THE CONSTRUCTION SAID TO HAVE BEEN PLACED BY THE COMMISSION UPON THE PROVISIONS OF THE CONSTITUTION AS THEY EXISTED PRIOR TO OCTOBER 10, 1911, IN SUPPORT OF WHICH CONTENTION PLAINTIFF IN ERROR CITES AUTHORITIES HOLDING THAT WHERE A STATUTORY PROVISION IS AMBIGUOUS, AND THE BODY CHARGED WITH ITS ADMINISTRATION HAS CONSTRUED SUCH AMBIGUOUS PROVISION, AND ITS CONSTRUCTION HAS BEEN ACQUIESCED IN FOR A LONG PERIOD OF TIME, SUCH CONSTRUCTION SHOULD BE ADOPTED BY THE COURTS.

Plaintiff in error makes no contention that the provisions of the Constitution, as it existed prior to October 10, 1911, were ambiguous, nor is it contended that there was any acquiescence in the alleged decision of the Commission. The contention is merely that the courts should adopt the Commission's view of the law as expressed in the *dicta* in the two *Scott, Magner & Miller* cases, and in support of this contention authorities are cited to the effect that where a statutory provision is ambiguous and the body charged with the administration of the statute has construed such ambiguous provision, and such construction has been acquiesced in for a long period of time, such construction should be adopted by the courts.

At page 39 of the petition for a rehearing counsel cite a number of cases decided by the Supreme Court of the United States and state "that this court in rendering its decision should under these authorities have followed the construction placed upon the Constitution and the statutory law of the State by the Railroad Commission of California."

At the risk of unduly prolonging this answer, we will examine each of these cases.

The first case cited is *New Haven R. R. Co.* v. *Interstate Commerce Commission,* 200 U. S. 361, 401. That case was commenced by the Interstate Commerce Commission against the New Haven Railroad Company and the Chesapeake and Ohio R. R. Co. to enjoin the Chesapeake & Ohio from giving rebates. The rebates were given by a subterfuge, the carrier purchasing coal at the fields and selling it to the New Haven Railway Company at New Haven, at a price which did not pay the cost of purchase, the cost of delivery and the published freight rate. The coal was sold in New Haven by the carrier for $2.75 per ton. The cost of the coal at the field plus the cost of water transportation from Newport News to New Haven was $2.47, leaving the Chesapeake & Ohio Company but 28 cents per ton for carrying the coal from the fields to Newport News. The published rate was $1.45. Prior to the bringing of this action for an injunction, the Interstate Commerce Commission had repeatedly held that the practice complained of was contrary to the provisions of the Act to Regulate Commerce, prohibiting discrimination and the giving of rebates. The defendants contended that this construction of the Act should not be adopted by the courts. The Supreme Court adhered to the Commission's view of the statute. The decision was placed especially upon the ground that after these decisions of the Commission, Congress had frequently amended the Act without changing it in this particular.

The next case cited is *U. S.* v. *Cerecedo Hermanos Y. Co.,* 209 U. S. 337, 339. This case involved the con-

struction of a clause of the tariff act. The question at issue was as to the amount of duty which should be assessed on thirty cases of red wine imported from France. The Supreme Court said that the construction of the clause contended for by the Government was right and needed no comment to make it clear. It also appeared that the Treasury Department in its published rulings had repeatedly followed the construction contended for by the Government. Referring to the rulings of the department, the Supreme Court said that "where the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department charged with its execution." The court also said that as the clause of the Act had been re-enacted by Congress without change after the rulings by the Treasury Department such re-enactment was an adoption by Congress of such construction.

The next case cited is *Robertson* v. *Downing,* 127 U. S. 607. This case was an action to recover duties alleged to have been illegally assessed. The plaintiff imported from Mulheim, Germany, a quantity of steel rods. They were shipped from Antwerp in Belgium. The appraisers added to the invoice value the cost of transportation from Mulheim to Antwerp. The question in the case was whether, under the statute, charges on the transportation of goods imported from one country which on their passage may pass through another country, should be added to the invoice value of the articles to make their dutiable value under Section 2907 of the tariff act of 1874. The plaintiff proved that the Treasury Department for a long period of years had construed the section of the statute to mean that such charges should not be added

where the point of shipment was in another country. The Supreme Court said:

> "This construction of the Department has been followed by many years without any attempt of Congress to change it. * * * The regulation of a department of the government is not, of course, to control the construction of an Act of Congress when its meaning is plain. But when there has been a long acquiescence in a regulation, and by it the rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons."

The next case cited is *U. S.* v. *Healey,* 160 U. S. 136. This case involved the construction of a section of the Act of 1877, providing for the sale of desert lands. This particular section of the act had been construed many times by the Department of the Interior. The syllabus of the case is as follows:

> "When the practice of a department in interpreting a statute is uniform, and the meaning of the statute, upon examination is found to be doubtful, or obscure, this Court will accept the interpretation of the department as the true one; but when the department practice has not been uniform, the Court must determine for itself what is the true interpretation."

The next case cited is *Komada & Co.* v. *U. S.,* 215 U. S. 392, 396. The syllabus of this case is as follows:

> "The construction given by the Department charged with executing a tariff act is entitled to great weight; and where for a number of years a manufactured article has been classified under the similitude section this court will lean in the same direction; and so held that the Japanese

beverage, sake, is properly dutiable under Section 297 of the tariff act of July 24, 1897, c. 11, 30 Stat. 151, 205, as similar to still wine and not as similar to beer.

"After a departmental classification of an article under the similitude section of a tariff law, the re-enactment by Congress of a tariff law without specially classifying that article may be regarded as a qualified approval by Congress of such classification."

The next case cited is *La Roque* v. *U. S.,* 239 U. S. 62. This case involved the allotment of lands to Indians under the Nelson Act of 1889. An Indian, Vincent La Roque, died without having selected an allotment. His father, Henry La Roque, claimed that he was entitled to the allotment on the ground that he was the sole heir. The Circuit Court of Appeals for the Eighth Circuit (170 Fed. 302) had held in another case that "until the allotment was made, the right was personal—a mere float, giving him no right to any specific property. This right from its nature would not descend to his heirs." The Department of the Interior had uniformly construed the act as giving the right only to living Indians. The Supreme Court held the "construction given the Act in the course of its actual execution is entitled to great weight."

The next case cited is *U. S.* v. *Hammers,* 221 U. S. 220. In that case the question under consideration was whether a desert land entry is assignable. The syllabus is as follows:

"Where a statute is so ambiguous as to render its construction doubtful the uniform practice of the officers of the department whose duty has been to construe and administer the statute since

its enactment and under whose constructions rights have been acquired is determinatively persuasive on the courts.

"There is confusion between the original desert land act of 1877 and the act as amended in 1891 as to whether entries can be assigned, and the court turns for help to the practice of the Land Department in construing the act, and that has uniformly been since 1891 that entries were assignable."

The next case cited is *State of Louisiana* v. *Garfield,* 211 U. S. 70. In this case one of the questions involved was whether title to swamp lands granted by Congress to a state passed to the state upon the approval by the Secretary of the Interior, or when the patent issued. The Supreme Court said that the continuous construction of the Department had been to the effect that title passed upon approval and that a great number of titles to a very large amount of land would be disturbed if the court held to the contrary.

From the cases cited by plaintiff in error it is apparent that the decisions of an administrative body will be adopted by the courts when all of the following conditions co-exist:

1. Where the statute is so ambiguous as to render its construction doubtful.

2. Where in the face of the decisions of the administrative body the legislature has amended the statute without changing the terms of the ambiguous provision construed by the administrative body.

3. Where there has been long acquiescence in a ruling of the administrative body and by it the rights of parties for many years have been determined and adjusted.

4. Where the decision of the administrative body has been acquiesced in by all the departments of the government for a long period.

Now let us see whether any of these conditions exist here. *The long and short haul clause of the Constitution, as it existed prior to the amendment of October* 10, 1911, *was not ambiguous.* In plain and unequivocal terms it conferred upon the shippers of freight the right to have their goods transported at charges not exceeding the charges to more distant points. Section 22 of Article I of the Constitution provides that "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." In *Matter of Maguire,* 57 Cal. 604, the Supreme Court of California, with reference to this provision, said:

> "The Constitution furnishes a rule for its own construction. That rule is that its provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise (Article 1, Section 22). We find no such express words in the Constitution. *This rule is an admonition placed in this, the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, 'we mean what we say.' Such is the declaration and command of the highest sovereignty among us, the people of the State, in regard to the subject under consideration."*

And in *McDonald* v. *Patterson,* 54 Cal. 247, the Supreme Court said:

> "In the construction of this Constitution, the rules expressed in Section 22, Article I, *must always be regarded.* That section declares that

'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.'

"Now, in the light of this rule, laid down in words so clear and terms imperative, we will examine the sections above referred to.

"The language of Section 19, of Article II, is both mandatory and prohibitory in its character. It is clear and unambiguous. *It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue we are at a loss to determine."*

Never while the long and short haul clause of the Constitution, as it stood prior to October 10, 1911, was in existence, did the Railroad Commission ever even intimate that it had power to establish rates in contravention thereof. The *Scott, Magner & Miller* cases were decided, one in April and the other in August, 1913. Before these decisions were rendered by the Commission the constitutional provision, as it existed prior to October 10, 1911, had been abrogated. The Commission in these two cases was not attempting to construe an existing law, but one which had been repealed.

Nor do counsel for plaintiff in error contend that there was any ruling of the Commission that has been acquiesced in by the courts and the people. At page 41 of the Petition for Rehearing, the following statement is made:

"Never since the adoption of the Constitution in 1879 until the cases recently decided by the

California Railroad Commission have the questions involved in this suit been raised."

As there was no ambiguous provision to be construed by the administrative body, and as the administrative body had never construed any provision ambiguous, or otherwise, while it was an existing law, it follows that never in the face of any decision of the administrative body did the people amend the Constitution without changing the terms of the ambiguous provisions. In fact, the provisions of the Constitution in relation to common carriers were never amended prior to October 10, 1911.

There never was long or any "acquiescence in the rulings of the administrative body. The case at bar and all the other actions pending in the state courts brought to recover charges exacted in violation of the long and short haul clause of the Constitution, as it existed prior to October 10, 1911, were pending in the courts long before the Commission uttered the *dicta* in the first *Scott, Magner & Miller* case. That case was decided by the Commission on April 15, 1913. This action was begun on January 14, 1913. Some of the actions pending in the state courts were commenced over a year before the decision of the Commission in the first *Scott, Magner & Miller* case. The action under consideration by the District Court of Appeal in *Southern Pacific Company* v. *Superior Court* (20 Cal. App. Dec. 674, 27 Cal. App. Rep. 240), and by the Supreme Court in *Southern Pacific Company* v. *Superior Court* (50 Cal. Dec. 36, 150 Pac. 404), was commenced on July 12, 1912. (27 Cal. App., pg. 240.)

Nor was the complainant in the *Scott, Magner & Miller* cases "acquiescing" in any ruling of the Commission. In 1912, they were insisting on their consti-

tutional rights. As we have already seen, however, they were never deprived of any rights under the Constitution, as it existed prior to October 10, 1911, the charges which they paid not having been in violation of the Constitution as it existed before that date. *The fact is that no controversy was ever before the Commission involving a violation of the long and short haul clause of the Constitution as it existed prior to October* 10, 1911. Nor would it have made one iota of difference if the *Scott, Magner & Miller* cases had involved charges in violation of the Constitution as it existed prior to October 10, 1911. The situation there would have been that some dissatisfied shippers attempted to enforce his remedy before the Commission, and because of an erroneous view of the law by the Commission they were denied relief, whereas other aggrieved shippers at the same time sought relief in the courts.

Moreover the Commission had no jurisdiction of the controversy involved in the two *Scott, Magner & Miller* cases. As the controversy involved was not within the jurisdiction of the Commission, its opinion rendered on determining such a controversy is entitled to no weight whatsoever. In *Southern Pacific Company* v. *Superior Court,* 20 Cal. App. Dec. 674 (27 Cal. App. Rep. 240, 255), the District Court of Appeal held that the Commission had no jurisdiction to pass upon alleged illegal charges such as were the subject of controversy in the *Scott, Magner & Miller* cases. The Court said:

> "The jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief."

As there had been no decision by the Railroad Commission construing the Constitution as it existed prior to October 10, 1911, until after these constitutional provisions were abrogated, there, of course, could not have been any "acquiescence" on the part of all or any departments of the government in such a construction. As a matter of fact, however, in 1908 the Attorney General of the State advised the Railroad Commission that it had no power to authorize the carriers to charge a higher rate for the shorter than for the longer distance.

At page 41 of the Petition for Rehearing counsel say "the bench and bar, carriers and shippers alike, have regarded the law as settled" that rates "established" by the Commission were legal whether they violated the prohibition of the Constitution as it existed prior to October 10, 1911, or not.

Practically the same statement was made in plaintiff in error's first brief where it was said that "for more than thirty years the provisions of Section 21 of Article XII had been treated by the public, the Commission and the carriers as controlled by the provisions of Section 22, giving the Commission the power to fix rates."

This contention was replied to at pages 81 et seq. of the Supplemental Brief of defendant in error. As there pointed out, if what counsel state were the fact, it would make not a particle of difference. A plain unambiguous provision of the supreme law of the State could not be rendered nugatory because for "thirty years" the carriers had succeeded in ignoring it, or because the Commission had failed in its duty,

or because such of the public as were affected by its violation had submitted to the unlawful demands of the carriers. This contention in effect is that plaintiff in error acquired by prescription the right to violate the law and to deprive the assignors of defendant in error of their constitutionality conferred right to have their property transported at charges not exceeding those made for the longer distance.

It is not a fact that the Commission so construed the constitutional provisions for "thirty years." The first time that the Commission ever so construed it, as far as we can ascertain, was when it rendered its decision in the *Scott, Magner & Miller* case (2 C. R. C. 626) on April 15, 1913, which was about three months after this action was commenced. Moreover, in that case the Commission, although it expressed the view that the Constitution should be so construed, expressly stated that as the matter was not involved it would not consider it further (p. 631). If the Commission so "construed" the constitutional provision when on June 11, 1909, it received for filing the tariffs filed with the Commission by the plaintiff in error, we do not know that such is the fact as the order merely stated that the tariffs filed "were received and filed * * * and that said rates, fares and charges shall be the lawful rates, fares and charges of said carriers respectively, subject to be changed by this Commission, pursuant to the provisions of Section 19 of the aforesaid Act." The Commission had no discretion about "receiving and filing" them, and its statement that they should be the "lawful rates" was merely a statement of a conclusion of law. They became lawful rates (provided they did not violate the Constitution) when

the schedules containing them were filed. The Commission probably assumed in making these schedules the carriers had observed the constitutional provisions. Prior to the enactment of the Statute of 1909 there was no law which required a carrier to file its tariffs with the Commission. By its order of June 11, 1909, the Commission merely received for filing certain tariffs filed with the Commission, but made no attempt to establish any rates different from those proposed by the carriers. The "thousands of rates" referred to by counsel are evidently the rates specified in these tariffs prepared and filed by the carriers.

The first order of the Commission establishing a rate was made on November 22, 1887. On that date the rate from San Francisco to Pajaro and Watsonville was ordered reduced ten per cent. In ordering the rate reduced the Commission expressly directed that the reduced rate should be the maximum rate to all intermediate points. The order provided:

> "And in no instance, after the said ten per cent reduction, shall the reduced rate for the long haul be less than that charged for the shorter haul, and that the reduced long haul rate shall be the maximum charge for the shorter haul."
> (Vol. 1 of Minutes, pg. 32.)

For some reason which is not apparent the order reducing the rates was never put into effect.

Prior to the year 1908 *the Commission had never established any rates except in a few isolated cases.* This appears from the decision of the Commission in *Re Matter of Alleged Discrimination by Southern Pacific Company* (Decision No. 102 rendered Janu-

ary 12, 1909, Annual Report of Railroad Commission for the year 1908, pg. 51).

In that case the Railroad Commission decided, in view of the fact that before the date of the discrimination complained of the Commission had not, except in a few isolated instances, established any rates, that the penalties provided by the Constitution for charging rates in excess of the established rates could not be enforced. The Commission said:

> "In the preparation for the investigation the Attorney General had carefully examined the records of the Board of Railroad Commissioners to ascertain if the Constitutional mandate that they should
>
> > 'Establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such charges as they shall make'
>
> had been properly complied with. He found that prior to January, 1908, it had not except in a few isolated cases, and after stating that fact in his argument, added:
>
> > 'It now follows, therefore, gentlemen, that with the exception of such rates as the Commission has established, the penalty cited in the Constitution provision does not apply.'
>
> It cannot therefore be said in this decision that the Southern Pacific Company has failed to move traffic in conformity with established rates, or has charged rates in excess thereof, because during the time comprehended in this investigation there were no established rates."

On January 17, 1908, the Commission passed the following resolution (Vol. 3 of Minutes, pg. 198):

> "*Whereas,* It does not appear from the records of this Board that the rates in effect in this State have ever been established by the Board, and
>
> "*Whereas,* Such action on the part of the Board seems to be necessary to complete the placing of transportation companies within its control and jurisdiction, *Now, Therefore, Be It Resolved:* That the rates published by the various transportation companies in effect on their various lines, are hereby adopted as the rates of this Commission, subject to review and correction upon complaint and investigation."

Just how the "bench and bar, carriers and shippers" could for thirty years have "regarded" that rates "established" by the Commission were valid, whether or not they were in conflict with the long and short haul clause of the Constitution, is not apparent in view of the fact that never until 1908 did the Commission attempt to establish any rates. In not one of the isolated cases where the Commission did establish rates prior to 1908, did the Commission attempt to establish any rates which conflicted with the long and short haul clause of the Constitution.

Even after 1908 the Commission, as we have seen, merely "approved" the tariffs filed by the carriers. In so doing they may have assumed that if any of the tariffs specified a higher rate for a shorter distance than was specified for a longer distance the rate for the longer distance became the maximum rate for the shorter distance.

In plaintiff in error's brief the statement was that

the "public, the Commission and the carriers" treated the prohibition as controlled by the provision of Section 22, giving the Commission the power to fix rates. To the "public, the Commission and the carriers" the plaintiff in error has, in its Petition for Rehearing, added the "bench and bar." And yet this statement as to the views of the "bench and bar" immediately follows the statement quoted above to the effect that never since the adoption of the Constitution in 1879 until the cases recently decided by the California Railroad Commission have the questions involved in this suit been raised.

As a matter of fact the bench of this State has uniformly held that the Commission had no power, prior to October 10, 1911, to establish rates which violated the long and short haul prohibition. Such was the holding of the Superior Court of Kern County (Hon. Howard A. Peairs, Judge) in the judgment reviewed by the District Court of Appeal and by the Supreme Court in *Southern Pacific Company* v. *Superior Court of Kern County* (20 Cal. App. Dec. 674, 27 Cal. App. Rep. 240, 50 Cal. Dec. 36).

The Superior Court of Kings County (Hon. M. L. Short, Judge) also held the same way in the action of *California Adjustment Company* v. *Atchison, Topeka & Santa Fe Railway Company.* In that case Judge Short held that the Commission had no power, prior to October 10, 1911, to establish rates which violated the constitutional provision. The appeal of the defendant from the judgment in that case is now pending in the State Supreme Court. (Sacramento No. 2584.)

In no case that has ever been called to our attention

have any of the Superior Courts of this State adopted the construction of the Constitution contended for by plaintiff in error.

We are quite certain that the members of the bar in the towns of the San Joaquin Valley who were consulted about this matter in 1909 and 1910 did not "regard" the law as settled that the Commission could establish rates which contravened the provisions of Section 21 of Article XII of the Constitution. And we are likewise quite certain that the shippers whose rights are involved in this action never so "regarded" the law. We are advised by a number of these shippers that in the years 1909 and 1910 they consulted their local attorneys in regard to the matter and were advised that they were being overcharged. Some of these shippers took the matter up with the local representative of the carriers and were told that the long and short haul provision of the Constitution was "unconstitutional." They were also informed by the carriers' representatives that if any action was taken the carriers would take the case to the United States Supreme Court. It was never intimated to these shippers that the rates were legal because "established" by the Commission. The amount which any individual shipper was overcharged was comparativcly trifling, as nearly all the shipments were small. Hence the shippers deemed it better policy to pay the charges than to incur the expense of litigation extending over a number of years. In 1911, however, some of the shippers into the San Joaquin Valley organized for the purpose of recovering the charges which they conceived to be excessive and organized the California Adjustment Company. Other shippers joined them and thereby the expense

of the litigation did not fall too heavily upon any one shipper.

In 1911, before the amendment to the Constitution of October 10, 1911, one of the most prominent members of the bar of this city furnished a written opinion to clients who were shipping from San Francisco to points in the San Joaquin Valley. In his opinion this gentleman advised his clients that under no pretext could the carriers charge higher rates to the intermediate points. In his opinion the following statement is made:

> "It is clear that it is not legal for the railroad to charge more for the shorter haul, inasmuch as this is expressly forbidden by the Constitution."

Another matter may be referred to here, although it is not really pertinent to the reply to the petition for a rehearing, but is, nevertheless, interesting in view of certain contentions made by plaintiff in error in this case. Counsel for plaintiff in error in their briefs have contended, upon the assumption that rates violative of the long and short haul provisions of the Constitution as it existed prior to October 10, 1911, were lawful, that "chaos" would result from the "immediate operation" of the amendment to the Constitution of October 10, 1911. In this connection it is interesting to note what the Commission said in the second *Scott, Magner & Miller* case (3 C. R. C. 339, 341), decided August 2, 1913. In that case Mr. Commissioner Loveland, who wrote the opinion, stated that an order made by the Commission on June 11, 1909, "establishing" the rates contained in all the tariffs on file prior to that date, made legal all rates specified therein which violated the constitutional provision. Mr. Loveland then called attention (pg.

341) to the "Stetson-Eshleman Act" which went into effect on February 10, 1911. Referring to this Act the Commissioner said:

> "In this connection, I wish to draw attention to Section 17 of the Stetson-Eshleman Act, which went into effect on February 10, 1911. Under the provisions of this section, it was made the duty of the railroads to file tariffs with the Commission, and it made it the duty of the Commission to establish the rates so filed, or others in lieu thereof, within at least thirty days from the date the rates were filed. Under the provisions of this section the defendant company filed a tariff which included the rates covering the shipment of hay between the points involved in this proceeding. On June 2, 1911, the Commission passed a resolution approving such of the rates contained in the tariff so filed as were not in violation 'of the provisions of the Constitution or statutes of California.'"

The Commissioner then expressed the opinion that the order of June 2, 1911, had the effect of disestablishing the rates violative of the Constitutional provision theretofore "established" by the order of June 11, 1909, and that no rates in violation of the Constitution contained in such tariffs were legal after June 2, 1911. What counsel contend the people could not accomplish by an amendment to the Constitution was accomplished, according to Commissioner Loveland, by the terms of the order of the Commission made on June 2, 1911. According to the Commissioner's opinion in this case the complainants were entitled to reparation for all charges in violation of the long and short haul clause of the Constitution which were exacted subsequent to June 2, 1911.

SUMMARY OF ARGUMENT IN ANSWER TO CONTENTIONS MADE IN PETITION FOR REHEARING

The foregoing argument may be very briefly summarized.

The obvious answer to the contention, based upon the decision in the case of *Pacific Tel. & Tel. Co.* v. *Eshleman,* 166 Cal. 644, that the opinions of the Commission construing the Constitution and construing its own orders are binding on the courts, is that the case cited decides nothing of the kind, but merely holds, in the language of Section 67 of the Public Utilities Act, that the findings and conclusions of the Commission on questions of fact are made final and not subject to review.

The answer to the contention that the Railroad Commission is the "court of last resort" of California and that its opinions on questions of law are binding upon the Federal courts, is that the Railroad Commission is not the court of last resort of California. Because its findings of fact are final it does not follow that its opinions on questions of law are authoritative. The "court of last resort" of this state is the Supreme Court. As stated in *Northern Pacific Ry. Co.* v. *Meese,* 239 U. S. 614, 619, "It is the settled doctrine that Federal Courts must accept the construction of a state statute deliberately adopted by its highest court."

The answer to the contention that the courts should adopt the construction said to have been placed by the Commission upon the Constitution as it existed prior to October 10, 1911, is that the construction placed upon a statute by an administrative body will be adopted only where the statute is ambiguous, and

where the rulings of the administrative body have been acquiesced in for a long period of time, and especially where the legislature, after the ruling of the administrative body has amended the statute without changing the terms of the ambiguous provision construed by the administrative body. Not one of these conditions exist here. The provision of the Constitution, as it existed prior to October 10, 1911, is not ambiguous. The so-called rulings of the Commission in the two *Scott, Magner & Miller* cases were rendered nearly two years after the constitutional provision in question had been abrogated. What was said by the Commission was merely *dicta* as it was conceded that the charges collected by the carriers did not violate the terms of the Constitution. There was no "acquiescence" in the rulings, the fact being that actions by shippers to recover freight charges exacted in violation of the constitutional provision were pending in the courts over a year before the "rulings" of the Commission in the cases referred to. Moreover, while the constitutional provision, as it existed prior to October 10, 1911, was in force the Attorney General advised the Commission that it had no power to authorize the carriers to charge higher rates for the shorter distance. Furthermore, the proceedings in the two *Scott, Magner & Miller* cases were null and void, as the Commission had no jurisdiction of the controversy (*Southern Pacific Company* v. *Superior Court,* 20 Cal. App. Dec. 674).

It is respectfully submitted that the petition for rehearing should be denied.

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